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TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE JUDICIARY COMMITTEE
March 9, 2018

Good morning Senators Doyle and Kissel, Representatives Tong and Rebimbas, and distinguished members of the Judiciary Committee. I appreciate the opportunity to provide testimony in support of House Bill 5252, An Act Concerning Antitrust Litigation. Last year, the legislature passed an important bill that amended Connecticut's antitrust laws to allow indirect purchasers - - largely Connecticut state, municipal and local agencies and our consumers - - to recover damages sustained from illegal price fixing agreements in the pharmaceutical and medical device markets. Section 1 of the bill before you today would broaden that amendment to encompass all markets impacted by such anticompetitive and anti-consumer schemes and align Connecticut's Antitrust Act with the laws of the majority of other states. I truly believe this is a prudent and necessary step. While today's focus is rightly on harms caused by price fixing and other illegal antitrust agreements in the pharmaceutical markets, we do not know what markets may be impacted by such schemes in the future. I do know, however, that Connecticut consumers and government purchasers historically have been unable to participate in a number of antitrust settlements and judgments outside the pharmaceutical and medical device markets, and hence precluded from obtaining financial restitution for such violations simply because they reside in Connecticut instead of Massachusetts, New York, Rhode Island or a number of other states. That is unfair.

Connecticut is currently in the small minority of states that have not passed what is known colloquially in the legal field as an "*Illinois Brick* Repealer". *See* attached map and chart detailing which states have passed or otherwise recognize an *Illinois Brick* Repealer. *Illinois Brick* was a 1977 United States Supreme Court case holding that only direct purchasers can sue antitrust violators for damages under the federal antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Because the Connecticut Antitrust Act provides that Connecticut's state courts will be "guided by interpretations" of antitrust law given by federal courts to federal antitrust statutes, the Attorney General and Connecticut consumers, including state, municipal and local agencies, who are indirect purchasers cannot recover damages under the Connecticut Antitrust Act. Many states have successfully repealed the controlling effect of this case, hence the name "*Illinois Brick* Repealer." Indirect purchasers in Connecticut, however, have been unable to participate - - and thus obtain damages - - in many antitrust settlements.

When there is a conspiracy between manufacturers, typically only the wholesaler is a direct purchaser. Retailers and consumers are almost always indirect purchasers who cannot obtain damages under federal law, even though the wholesaler has often passed the artificial price increase on to its customer. The controlling case in Connecticut is *Vacco v. Microsoft*, 260

Conn. 59 (2002), which holds that indirect purchasers do not have standing under Connecticut antitrust law or our unfair trade practices statute to pursue a claim for monetary damages. *Id.* at 76-77.

Repealer legislation does not cause any new category of conduct to be considered unlawful – the conduct is already unlawful. All that changes is that the Connecticut state agencies and consumers who ultimately paid the artificially higher price will now be able to recover. In my testimony last year I used as an example, the current litigation against generic drug manufacturers my office and a number of other Attorneys General have brought against several generic drug manufacturers. In that litigation, the State of Connecticut is limited to obtaining injunctive relief, disgorgement and a civil penalty. Other litigating states with repealers, on the other hand, can obtain compensatory damages for their respective state agencies and consumers. If necessary, I can provide this committee with information about a number of additional examples - - outside the pharmaceutical and medical device markets - - where Connecticut state agencies and consumers were relegated to the sidelines and unable to obtain meaningful compensatory relief for the financial harm they suffered at the hands of antitrust conspirators, including:

- Price fixing of vitamins;
- the Microsoft litigation;
- Computer memory chips;
- Liquid Display Panels for televisions and computer screens; and
- Automobile part and supplies.

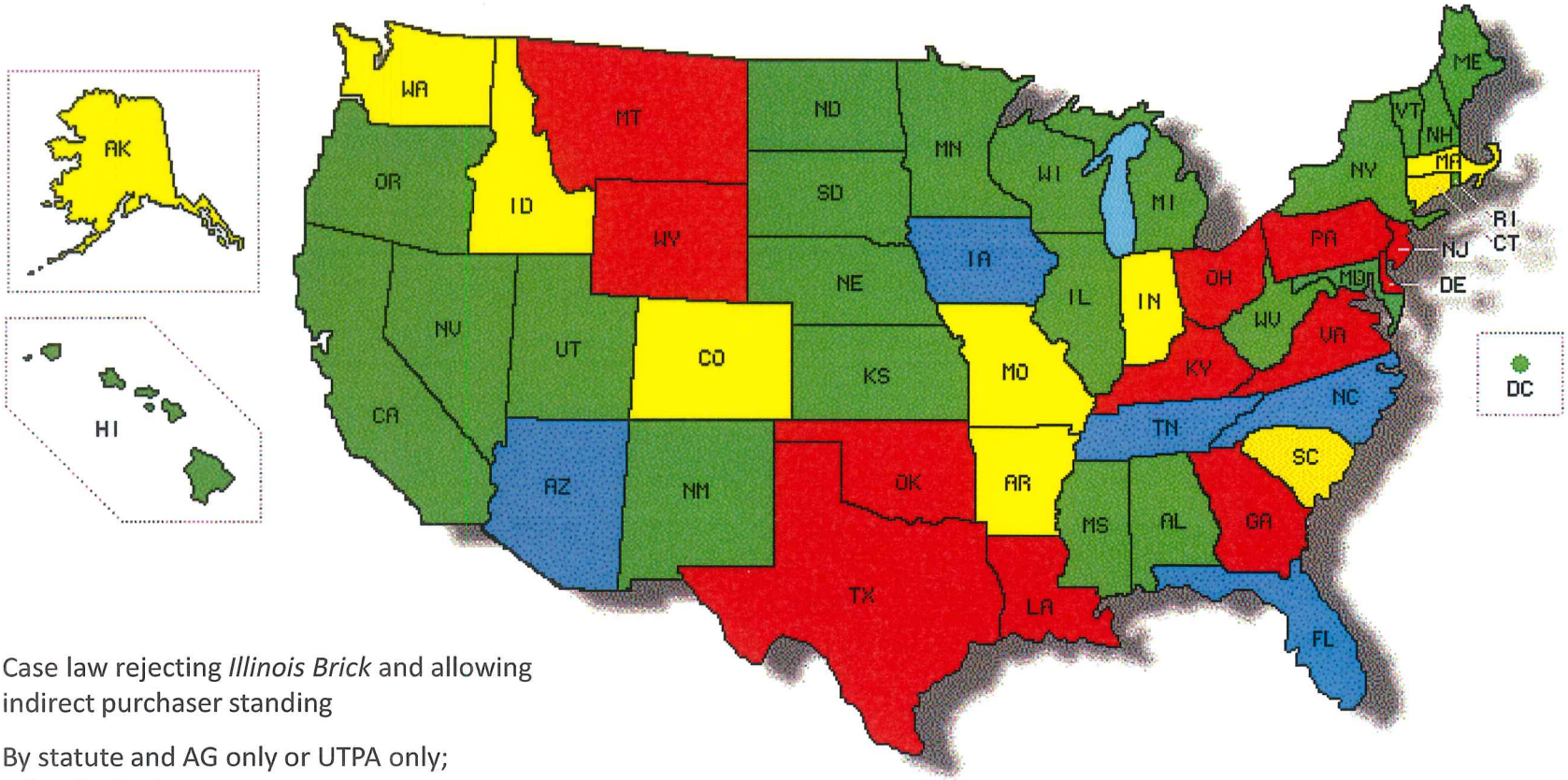
In each of these examples, and many others, consumers in *Illinois Brick* Repealer States obtained compensatory damages for the antitrust violations perpetrated against them while Connecticut's consumers did not. Passing a full *Illinois Brick* Repealer would permit my Office to recover damages for the state and Connecticut consumers who suffer as a result of illegal price fixing, regardless of whether the State of Connecticut or its consumers purchased products directly from manufacturers who fixed prices or through a wholesaler who passed the costs on to consumers or others. Connecticut would join the majority of states that have adopted an *Illinois Brick* Repealer of one sort or another. The proposed language I have attached to my testimony would achieve this important goal.

Section 2 of the bill would amend our Whistleblower Law and False Claims Act to permit my Office to serve investigative subpoenas by certified mail, just as we are currently permitted to do under the Connecticut Antitrust Act. It also would require us to return documents and information we obtain through a False Claims Act subpoena to the producing party at the conclusion of an investigation or related lawsuit, as we are currently permitted to do under the Connecticut Antitrust Act.

These amendments will reduce the administrative burdens and costs my office incurs when serving False Claims Act subpoenas and protect sensitive business and medical records produced pursuant to those demands. Under current law, service of a subpoena under the state False Claims Act usually requires one of my investigators to drive to the person's residence or place of business to serve the subpoena. This is unnecessary, inefficient and costly, particularly when an investigator has to make multiple trips. In contrast, service of subpoenas under the Connecticut Antitrust Act can be accomplished via certified mail. The proposed legislation will enable my office to serve False Claims Act subpoenas in the same manner as antitrust subpoenas. The legislation also proposes to align the treatment of documents obtained during False Claims Act investigations with the way such information and records are treated under the Connecticut Antitrust Act. Documents obtained during an antitrust investigation are exempt from the Freedom of Information Act ("FOIA") and must be returned to the producing party at the conclusion of an investigation or related litigation. As the Connecticut Supreme Court has noted, this is in part a "recognition that the documents are the personal property" of the subpoenaed recipient. *See Brown and Brown, Inc. v. Blumenthal*, 297 Conn. 710, 723-24 (2010). The False Claims Act does not currently provide my office with the same authority even though those documents also are exempt from the FOIA and the documents oftentimes contain highly sensitive business and personal information. Having the authority to return such documents to producing parties would reduce the risk that such information may inadvertently be disclosed publicly.

I urge the Committee to approve these very sensible proposals. Please feel free to contact me with any questions or concerns.

Illinois Brick Repealer by State



Case law rejecting *Illinois Brick* and allowing indirect purchaser standing

By statute and AG only or UTPA only; other limitations

Illinois Brick repealer and private plaintiff standing

No indirect purchaser standing

Prepared by the Connecticut Attorney General's Office (2017)

State Illinois Brick Repealer Laws Chart

by Practical Law Antitrust

Maintained • USA (National/Federal)

This Chart provides a comprehensive list of the states that have rejected the Illinois Brick doctrine and the corresponding case law or statute.

The Supreme Court held in *Illinois Brick Co. v. Illinois* that indirect purchasers do not have standing to bring antitrust claims for damages (431 U.S. 720, 746-47 (1977)).

In a typical scenario, conspiring manufacturers agree to fix the prices of their products and then sell those products to direct customers such as wholesalers or retailers. These entities, the direct purchasers, then resell the goods to other entities in the supply chain or to consumers (known as indirect purchasers). The Supreme Court reasoned that allowing both direct and indirect purchasers to bring antitrust damages claims would result in:

- Exposing defendants to duplicative claims for recovery.
- Complications in apportioning damages among various plaintiffs at different places in the distribution chain.
- Inefficient enforcement of the antitrust laws.

That decision, now referred to as the *Illinois Brick* doctrine, has been systematically rejected (or repealed) by a majority of the states through statutes or case law (known as *Illinois Brick* repealers). The Supreme Court ruled in *California v. ARC America* that *Illinois Brick* repealers are not preempted by federal law (490 U.S. 93, 101 (1989)).

This Chart lists the states that have rejected the *Illinois Brick* doctrine and provides the relevant statute or case in each state and a brief summary of the states' law on indirect purchaser standing.

For more information on antitrust standing in general and *Illinois Brick* in particular, see Practice Note, Antitrust Standing of Private Plaintiffs.

State	Authority
Alabama	Ala. Code § 6-5-60(a) allows direct or indirect victims to recover for antitrust violations.
Alaska	Alaska Stat. Ann. § 45.50.577 allows the Alaska Attorney General to bring claims on behalf of those indirectly harmed.
Arizona	*Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 102 (Ariz. 2003) held that the *Illinois Brick* decision is not binding on Arizona courts.
Arkansas	Ark. Code Ann. § 4-75-315(B) allows the Arkansas Attorney General to bring claims on behalf of those indirectly harmed

	by antitrust violations.
California	Cal. Bus. & Prof. Code § 16750 provides that persons harmed indirectly can bring antitrust actions.
Colorado	Colo. Rev. Stat. Ann. § 6-4-111(2) allows the Colorado attorney general to bring claims on behalf of those indirectly harmed by antitrust violations.
D.C.	D.C. Code § 28-4509 provides that indirect purchasers can bring antitrust claims.
Florida	*Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 108 (Fla. Dist. Ct. App. 1996) held that *Illinois Brick* only applied to federal antitrust claims and not state claims.
Hawaii	Haw. Rev. Stat § 480-13(a)(1) allows indirect purchasers to bring antitrust suits for compensatory damages.
Idaho	Idaho Code Ann. § 48-108(2) allows the Idaho attorney general to bring claims on behalf of those indirectly harmed by antitrust violations.
Illinois	740 Ill. Comp. Stat. Ann. 10/7 provides that state antitrust law does not preclude indirect purchaser recovery.
Iowa	Iowa Code § 553.12 allows a cause of action for indirect purchasers. *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 447 (Iowa 2002) interpreted Iowa state law to allow indirect purchaser suits.
Kansas	Kan. Stat. Ann. § 50-161(B) provides a cause of action for indirect purchasers.
Maine	Me. Rev. Stat. Ann. tit. 10, § 1104(1) provides a cause of action for indirect purchasers.
Maryland	Md. Code Ann., Com. Law § 11-209(b)(ii) provides for an antitrust cause of action for the state or any entity of the state regardless of whether the government purchaser was direct

	or indirect. Maryland also has a narrow exception to *Illinois Brick* for non-government plaintiffs, allowing indirect purchasers of any drug, medicine, cosmetic, food, food additive or commercial feed to bring a claim (Md. Code, Health-Gen § 21-1114).
Massachusetts	*Ciardi v. F. Hoffman-La Roche, Ltd.*, 436 Mass. 53, 63 (2002) noted that while antitrust law precludes indirect purchaser suits, indirect purchasers can bring a claim for anticompetitive conduct under a state consumer protection statute (Mass. Gen. Laws ch. 93A, 9(1)).
Michigan	Mich. Comp. Laws Ann. § 445.778 provides a cause of action for indirect purchasers.
Minnesota	Minn. Stat. Ann. § 325D.57 declares that the state, any of its government bodies, and any person has a cause of action for an antitrust violation, whether harmed directly or indirectly. The statute provides that courts may take steps necessary to avoid duplicative recovery.
Mississippi	Miss. Code. Ann. § 75-21-9 provides a cause of action for indirect purchasers.
Nebraska	Neb. Rev. Stat. § 59-821 creates a right to civil actions for indirect purchasers.
Nevada	Nev. Rev. Stat. Ann. § 598A.210 allows indirect purchasers to bring antitrust claims.
New Hampshire	*LaChance v. U.S. Smokeless Tobacco Co.*, 931 A.2d 571, 576-77 (N.H. 2007) held that although indirect purchasers do not have standing under antitrust law, they can bring claims under consumer protection laws.
New Mexico	N.M. Stat. Ann. § 57-1-3 allows for a cause of action for indirect purchasers but also allows defendants to use a pass-on defense.
New York	N.Y. Gen. Bus. Law § 340(6) provides for an antitrust cause of action whether or not the person dealt directly with the defendant but also provides that courts shall take all steps necessary to avoid duplicative recovery.

North Carolina	*Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 683 (N.C. Ct. App. 1996) recognized that North Carolina antitrust laws allow indirect purchasers to sue citing N.C. Gen. Stat. § 75-16.
North Dakota	N.D. Cent. Code Ann. § 51-08.1-08 allows for antitrust recovery even if the plaintiff did not deal directly with the defendant.
Oregon	Or. Rev. Stat. § 646.780(1)(a) allows antitrust damages suits by indirect purchasers.
Rhode Island	R.I. Gen. Laws Ann. § 6-36-12(g) allows the attorney general to bring an indirect purchaser suit on behalf of those harmed. However, the court is empowered to prevent duplicative recovery.
South Dakota	S.D. Codified Laws § 37-1-33 provides for a right of indirect purchaser claims but also provides that courts shall take all steps necessary to avoid duplicative recovery.
Tennessee	*Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 517 (Tenn. 2005) recognized an antitrust right of action for indirect purchasers under state law.
Utah	Utah Code § 76-10-3109 creates a cause of action whether the plaintiff dealt directly or indirectly with the defendant.
Vermont	Vt. Stat. Ann. tit. 9, § 2465(b) allows a cause of action even if the plaintiff did not deal directly with the defendant.
Washington	Wash. Rev. Code. Ann. § 19.86.080(3) allows for the state to sue when it is indirectly harmed but does not provide for individuals to bring indirect purchaser suits.
Wisconsin	Wis. Stat. Ann. § 133.18(1)(a) provides an antitrust cause of action for any person indirectly injured.

